

COURT FILE NUMBER:

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE OF EDMONTON

APPLICANT(S): PARAGON GAMING EC COMPANY

RESPONDENT(S): CIBC MELLON TRUST COMPANY and
BNY TRUST COMPANY OF CANADA

DOCUMENT: **AFFIDAVIT OF SCOTT MENKE**

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AFFIDAVIT OF SCOTT MENKE.

Sworn on April 19, 2012

I, SCOTT MENKE, of Las Vegas, Nevada, SWEAR AND SAY THAT:

1. I am a director of the Applicant and as such have a personal knowledge of the facts and matters hereinafter deposed except where otherwise stated in which case I believe the same to be true.

Purpose of this Affidavit

2. I make this Affidavit in support of an application requiring the Respondent, CIBC Mellon Trust Company or BNY Trust Company of Canada (collectively, "CIBC") to deliver up certain funds held by it in account number 234220001 (the "FNDF Account") to the Applicant.

Background

3. Attached as Exhibit "A" to this my Affidavit is a diagram which shows the various entities involved in respect of the River Cree Resort & Casino (the "Resort"). The Resort is located on the Enoch Cree Nation ("Enoch") Reserve, known as the Stony Plain Indian Reserve No. 135, and includes a casino (the "Casino"), hotel, restaurants, two ice rinks and other related facilities.

The Secured Creditors

4. CIBC is the Depositary, Administrative Agent and Security Agent for a group of lenders, including AIG Annuity Insurance Company, Ontario Teacher's Pension Fund (now known as Birchmont Investments Ltd.), Canyon Capital Advisors, BMO Guardian Capital LP, Mackenzie

Financial Corporation and Monarch Capital (the "Lenders"), which made loans to the Applicant for the purpose of funding development of the Resort (the "Loans") pursuant to a Note Purchase Agreement (the "NPA") and other related agreements.

5. Pursuant to the NPA, the Loans were to be paid out prior to midnight on April 16, 2012.
6. The outstanding balance of the Loans is approximately \$111,000,000.00.
7. For reasons described below, the Applicant was not able to repay the Loans by midnight on April 16, 2012.
8. The Demand Notice for repayment of the Loans was issued on April 18, 2012.

Operations of the Casino

9. The Casino is a First Nations casino pursuant to the Province of Alberta ("Alberta") First Nations Gaming Policy (the "Policy"), which Alberta approved in January 2001.
10. The Resort, including the Casino, opened in October 2006. By June 2007, the Casino was and continues to be the most successful casino in Alberta.
11. The Applicant is the Casino manager. It is also responsible for operation of the non-Casino portions of the Resort in its capacity as general partner of EPLP.
12. The Casino generates two types of gaming revenue: slot revenue and table revenue.
13. The table revenue is split as follows:
 - (a) Casino operator - 50%
 - (b) Charity - 50%.

In the case of a First Nations casino, unlike a non-First Nations casino, there is only one charity. For the Casino, the charity is Me'Chet Charity, which is solely an Enoch charity.

14. The slot revenue is split as follows:
 - (a) Casino operator - 15%
 - (b) Charity - 15%
 - (c) Alberta - 70%, further split as follows:
 - (i) Alberta (Lottery Fund) - 3/7th (which equates to 30% of the total slot revenue)
 - (ii) First Nations Development Fund (Host First Nation) - 3/7th (which equates to 30% of the total slot revenue)
 - (iii) First Nations Development Fund (Non-Host First Nation) - 1/7th (which equates to 10% of the total slot revenue).

Alberta created the First Nations Development Fund ("FNDF") pursuant to the Policy. These funds are available to Alberta First Nations with casinos (Host First Nations) and those without casinos (Non-Host First Nations) by way of grants. The FNDF grants must to be used for economic, social and educational purposes and cannot be used for casino purposes.

The FNDF Grant

15. In March 2002, Enoch, with the assistance of the Applicant, commenced the 8 step application process of the Alberta Liquor and Gaming Commission (the "AGLC") for a Casino Facility Licence.

16. As part of the application process, the Applicant, on Enoch's behalf, submitted various proposed structures and models that, among other matters, addressed the proposed uses of FNDF funds.

17. During the application process, Alberta sought and obtained the opinion of the Chief Internal Auditor of Alberta. The Chief Internal Auditor concluded that *"the proposed funds would provide economic and community development to the Enoch Cree Nation. These include the provision of local employment, occupational training and social development. This will apply to both the casino and non-casino operations"*. More specifically, in relation to *"projected cash distributions to stakeholders"* and *"projected FNDF funds required to support operations and proposed distributions to stakeholders and casino reserves"* over a 25 year term, the Chief Internal Auditor concluded that *"the above financial and non-financial information received indicate that the FNDF funds will be used for economic and community development and there is no subsidization of the casino operations. Therefore, it appears that the proposal meets the funding criteria as per the First Nations Gaming Policy"*. A copy of this opinion is attached as Exhibit "B" to this my Affidavit.

18. Alberta subsequently approved Enoch's FNDF grant application on September 26, 2005 (the "2005 FNDF Grant"). A copy of this approval and a subsequent letter of clarification are attached as Exhibits "C" and "D" to this my Affidavit.

19. The Applicant, its investors and its Lenders relied on Alberta's approval of the proposed use of the FNDF funds and the FNDF grant application. Had Alberta not granted these approvals, the Applicant would never have proceeded with the development of the Resort.

20. To date, Enoch has used the FNDF funds for the uses approved for the 2005 FNDF Grant. Enoch's use of the FNDF has been audited annually and these audits have been approved by Alberta.

The Monies Taken

21. As part of the documentation relating to the Loans, the Applicant, CIBC and other parties entered into a Deposit and Disbursement Agreement, a copy of which is attached as Exhibit "E" to this my Affidavit. The Deposit and Disbursement Agreement established various bank accounts, including the FNDF Account and also sets out the flow of funds, including FNDF funds, through the various accounts to the Applicant.

22. Alberta paid the FNDF funds for the quarter ending March 31, 2012, totalling approximately \$11,700,000.00, on April 12 and 13, 2012.

23. I am advised by the Applicant's controller that the FNDF funds were transferred to the FNDF Account no later than April 16, 2012.

24. The Applicant provided its direction to CIBC to transfer the FNDF funds from the FNDF Account to the Applicant's operating account at 2:25 pm EDT on April 16, 2012. A copy of the direction is attached as Exhibit "F" to this my Affidavit.

25. Although, for reasons that follow, the Applicant was not able to pay the entire outstanding balance of the Loans, the Applicant fully intended to make an interest payment to the Lenders from the FNDF funds received.

26. I am advised by the Applicant's controller that on April 16, 2012, Mark Wright of CIBC advised that the FNDF funds could not be transferred because it was too late in the day to do so. He did not, at any time, indicate that the FNDF funds were not in the FNDF Account. As a sign of good faith, while trying to resolve these problems, the Applicant was prepared to pay the Lenders interest on the Loans. Because of an apparent administrative difficulty (later to be discovered to be the result of a request by the Lenders to "hold off" on the transfer of the FNDF funds), the interest could not be paid on April 16, 2012. The Applicant, through counsel, advised the Lenders, through counsel, of the fact that the interest could not be paid on April 16, 2012, but that it would be paid the next day. A copy of this email advice is attached as Exhibit "G" to this my Affidavit.

27. Unbeknownst to the Applicant, Glenn Pinkerton, legal counsel for the Lenders, had directed CIBC to "hold off" on making any payments or wiring any funds. A copy of the email chain leading to and including this direction is attached as Exhibit "H" to this my Affidavit.

28. CIBC has refused to transfer the FNDF funds from the FNDF Account and continues to hold the FNDF funds in the FNDF Account.

29. The transfer of the FNDF funds is governed by the Deposit and Disbursement Agreement. Section 4.02 sets forth the requirement of a "Default Notice" being required to interrupt the flow of funds on the instructions of EPLP.

30. The FNDF funds are used for, among other uses, to fund the operations of the Resort. Without the FNDF funds, the Applicant's ability to operate the Resort is and will be seriously impaired.

The Default

31. The Applicant intended to refinance the Loans at a lower interest rate. As the funding from the 2005 FNDF Grant was projected to be fully paid out by late 2012, the Applicant was aware that in order to refinance the Loans, a new FNDF grant would be necessary.

32. In approximately May 2011, almost a full year before payment of the Loans was due, the Applicant and Enoch approached the Alberta Department of Aboriginal Relations (now the Alberta Department of International, Intergovernmental and Aboriginal Relations) ("IIAR") to advise of Enoch's intention to seek a new FNDF grant for refinancing purposes. At that time, and at all times thereafter, the Applicant and Enoch communicated to IIAR that it wished to continue using FNDF funds for the same uses as the 2005 FNDF Grant.

33. Between May 2011 and February 2012, the Applicant and Enoch met from time to time to discuss the proposed application for the new FNDF grant. During this time frame, Enoch submitted and IIAR reviewed various draft FNDF applications. In each draft FNDF application, the proposed uses of FNDF funds were, in substance, the same. Although Enoch did not submit the final form of its application for the new FNDF grant until February 2012 (the "2012

FNDF Grant Application"), through these discussions, IIAR was made aware of the proposed uses of FNDF funds well prior to submission of the 2012 FNDF Grant Application.

34. In February 2012, the Applicant obtained a commitment letter from a major Canadian financial institution for the purpose of refinancing the Loans. One of the conditions of the refinancing was approval of a new FNDF grant on certain specific terms. The Applicant provided the commitment letter to Peter Crossen ("Crossen"), the director of Alberta's FNDF grant program, in order to make him aware of the conditions that would be required in order to refinance the Resort.

35. Roxanna Benoit ("Benoit"), the Deputy Minister of IIAR, has advised that she is not prepared to approve the 2012 Grant Application in its current form. I am advised by the Applicant's counsel that she has suggested that the uses of FNDF funds that are proposed in the 2012 Grant Application are not the same as the uses that were approved for the 2005 FNDF Grant. This suggestion is not correct.

36. While the form of the 2012 Grant Application is different from the form of the approval for the 2005 FNDF Grant, in substance, the proposed uses of FNDF funds are the same as those approved for the 2005 FNDF Grant. On more than one occasion, representatives of the Applicant and Enoch have conveyed to Benoit, Crossen and others in IIAR that Enoch does not intend to change the uses of FNDF funds from the 2005 FNDF Grant and have requested that IIAR advise as to how it believes that the uses are different so that the 2012 FNDF Grant Application can be revised accordingly.

37. I am advised by the Applicant's legal counsel that Benoit has stated that Alberta has not changed its interpretation of the Policy, and in particular, the allowable uses for FNDF funds. However, to this point, she has refused to confirm that all of the uses of FNDF funds that Alberta approved for the 2005 FNDF Grant are still allowable uses. As of this date, Benoit has indicated IIAR will approve use of FNDF funds to pay a portion of the principal and interest for a refinancing of the Resort and some of Enoch's expenses; however, in order to have IIAR consider whether to allow any of the other uses of FNDF funds that were approved for the 2005 FNDF Grant to continue, Enoch should file a revised FNDF grant application in the same form as the application for the 2005 FNDF Grant.

38. I am advised by the Applicant's legal counsel that notwithstanding that the Applicant's representatives and Enoch's representatives have made Benoit, Crossen and other representatives of Alberta aware of the inability to repay the Loans, CIBC's refusal to release the FNDF funds from the FNDF Account and the impact on the Resort's ability to operate, Benoit and Crossen refused to provide a time frame for a response on a new application. Further, despite her statement that Alberta has not changed its interpretation of the Policy, she has refused to confirm whether Alberta still considers all of the uses approved for the 2005 FNDF Grant as allowable uses of FNDF funds.

39. As of this date, Alberta's position is not consistent with its previous approvals, including the approval of the 2005 FNDF Grant. If Alberta will approve a new FNDF grant application with the same uses as were approved for the 2005 FNDF Grant, then I am confident that the Applicant will be able to proceed with refinancing the Resort, which will enable the Applicant to pay the Loans.

The Dilemma

40. The Applicant is not in a position to proceed with refinancing of the Resort in order to repay the Loans without Alberta's approval of an FNDF grant for the same uses as those

position, she is refusing to confirm that all of the uses approved for the 2005 FNDF Grant are still allowable uses of FNDF funds. While she has indicated that IIAR will review a revised FNDF grant application, she has not given any timeframe within which this will occur.

41. As a result, the Applicant is unable to access funds that it requires in order to operate the Resort while it is waiting for Benoit to decide whether she will allow the use of FNDF funds to continue in the same manner as the 2005 FNDF Grant.

42. The Resort has successfully operated since it opened in 2006. It has approximately 900 employees and generates millions of dollars for the local economy. The Casino has exceeded all of Alberta's projections. Since opening, the Casino has generated approximately \$180 million in revenue for Alberta. Yet, as the Loans were not repaid, the Applicant is faced with a potential filing under one or more of the Bankruptcy and Insolvency Act or the Companies' Creditors Arrangement Act and finds itself in its current situation due to Alberta's refusal to date to allow the use of FNDF funds to continue in the same manner as the 2005 FNDF Grant.

43. The intention of the Applicant is that, while taking steps to resolve the inter-related issues with the Lenders and Alberta, to carry on business in the ordinary course. I believe that the Applicant is acting in good faith and with due diligence and that no one is prejudiced thereby.

SWORN before me at the City of
Edmonton, in the Province of Alberta, this
19th day of April, 2012.

A Commissioner for Oaths for and in the
Province of Alberta

Janice Agrios
Barrister & Solicitor



Scott Menke